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THE LAW RELATING TO TELEPHONES.

I.

THE term telephony was first used in a leeture given by Philip Reis, in Frankfort, Germany, in 1861; and is defined as the art of reproducing sounds at distances from their source. 23 Ency. Brit. 127.

"In a general sense, the name 'telephone' applies to any instrument or apparatus which transmits sound beyond the limits of ordinary audibility. The speaking tubes used in conveying the sound of the voice from one room to another in large buildings, or stretched cords or wires attached to vibrating membranes or disks by which the voice is carried to distant points, are, strictly speaking, telephones. But since the recent discoveries in telephony, the name is technically and primarily restricted to an instrument or device which transmits sound by means of electricity and wires, similar to telegraphic wires. In a secondary sense, however, and being the sense in which it is most commonly understood, the word 'telephone' constitutes a generic term, having reference generally to the art of telephony as an institution, but more particularly to the apparatus, as an entirety, ordinarily used in the transmission as well as reception of telephonic messages:" NIBLACK, C. J. *Hockett* v. *State* (1885), 105 Ind. 250; s. c. 24 AMERICAN LAW REGISTER, 325.

It has been expressly held that telephones are within the meaning of the word "telegraph" as used in a statute, and

within the scope of laws enacted for the regulation of telegraphic communication, even though such laws were passed before the telephone was invented: *Wis. Tel. Co.* v. *Oshkosh* (1884), 62 Wis. 32; *Attorney-General* v. *Edison Tel. Co.* (1880), L. R. 6 Q. B. D. 244.

II.

Telephones could not become of much value until the wires transmitting the sound from instrument to instrument were of some considerable length, passing over or through the property of others, not interested in the use of the instrument. These wires will need supports, hence the erection of poles or other structures becomes necessary. Being identical in this respect to telegraph lines and poles, the same rules have been applied to telephone lines and poles. The transmission of intelligence by electricity is a business of public character, to be exercised under public control, in the same manner as transportation of goods or passengers by railroad. In *Hockett* v. *State*, *supra*, it was said, "The telephone is one of the remarkable productions of the present century, and, although its discovery is of recent date, it has been in use long enough to have attained well defined relations to the general public. It has become as much a matter of public convenience and of public necessity as were the stage-coach and sailing vessel a hundred years ago, or as the steamboat and the railroad have become in later years. It has already become an important instrument of commerce. No other device can supply the extraordinary facilities which it affords. It may therefore be regarded, when relatively considered, as an indispensable instrument of commerce."

As the construction of telegraph poles and lines, so the construction of telephone lines and poles is a public use, for which the right of eminent domain may be exercised: *N. O. M. & T. R. R. Co.* v. *Southern & Atl. Tel. Co.* (1875), 53 Ala. 211; *Pierce* v. *Drew* (1883), 136 Mass. 75; *State et al.* v. *Am. & Europ. C. News Co.* (1881), 43 N. J. L. 381. And there is no doubt that the telephone, including all appendages incident to its use, is of such a public character, that the right exists to appropriate private property for its use, upon compensation

being granted the owner, whenever necessary for the convenience of the public.

III.

Whether the erection of the poles on the highway is such an additional burden upon the fee that the owner is entitled to additional compensation for such use, is a question upon which the courts are not united in their conclusions.

The weight of authority is that it is an additional burden, and that compensation must be made to the owner of the fee. There seems to be but one Court of eminence holding the opposite; that being the Supreme Court of Massachusetts. *Pierce* v. *Drew*, *supra*. See to same effect, note to *Hockett* v. *State*, in 25 AMERICAN LAW REGISTER, 327–8. In *Gay* v. *Mutual Union Tel. Co.* (1882), 12 Mo. App. 485, 494, the right of the Legislature to authorize the use of public highways for the erection of telegraph poles was conceded, and the case turned on the question of special damages from obstruction by a particular pole.

Other cases which seem to hold the opposite, upon closer examination will be seen to decide that, where the fee of the street or highway is in the public, the erection of telephone lines and poles is not such a perversion of the public use as to require compensation to be made to abutting land-owners: *Irwin* v. *G. S. Tel. Co.* (1885), 37 La. Ann. 63. The principle to be extracted from the cases was one of the points in *Story* v. *N. Y. Elevated R. R. Co.* (1882), 90 N. Y. 122, 124; that no structure can be authorized upon land owned by a city in fee for a street or highway, which is inconsistent with its continued public use as an open street. This was affirmed, not only as to all questions involved in that case, but also as to such as logically come within the principle therein determined: *Lahr* v. *Met. El. R. R. Co.* (1887), 104 N. Y. 268; where the abutting landowners were also owners of the fee of the street. It was held that compensation must be made for any use of the street not contemplated at the creation of the easement and not considered within the ordinary and usual use of a street or highway.

Smith v. *Central Dist. Print. & Tel. Co.* (1887), 2 Ohio Circ.

Ct. 259, is a case in point. "It is said that this is an improved method for the transmission; that under the old way, intelligence was transmitted by mail and by post-boy over the highways, and that this is but an improved method; that, therefore, it was within the originally contemplated user, and the public have the right to authorize such use of it. * * * Upon the question where lays the weight of authority, we have a divided Court in Massachusetts, five to two" (*Pierce* v. *Drew*, *supra*); "we have a decision of the Supreme Court of Illinois" (*The Board of Trade Tel. Co.* v. *Barnett* (1883), 107 Ill. 507), "holding that it cannot be done without compensation, and we have two decisions in the State of New York, one by the Supreme and the other by the Superior Court of that State, holding that it is an additional burden. * * * In Ohio, while the public may authorize the erection of telegraph or telephone poles along and upon the highways, so as not to interfere with the public use, at the same time, that does not authorize their construction as against the rights of adjoining lot or land-owners; but such erections and constructions are an additional burden upon the fee of the land, which must be first appropriated or acquired by contract before they may be taken." The same conclusion was reached by the Supreme Court of Minnesota, on an affirmance by a divided Court, in *Willis* v. *Erie T. & T. Co.*, October 7, 1887.

IV.

The construction of a telegraph or telephone line along the right of way of a railroad is the taking of the company's railroad property, for which the railroad is entitled to compensation: *Atlantic & Pacific Tel. Co.* v. *Chicago, R. I. & P. R. R.*, U. S. C. Ct. N. Dist. Ill. (1874), 6 Biss. C. C. 158; *Southwestern R. R. Co.* v. *Southern & Atl. Tel. Co.* (1872), 46 Ga. 43.

A railroad company may construct a telegraph or telephone line along its own route for its own use, and may cut standing trees on its right of way, without incurring any additional liability to the original owner of the land for compensation. If, however, the line is erected by another company, that company

is liable to the landowner for the damages to the land caused by such line. The same rule applies even if it is used jointly by the company putting it up and the company owning the route: *Western U. Tel. Co.* v. *Rich* (1878), 19 Kan. 517.

V.

Whether the mere stretching of a telephone wire, through the air, over the premises of another, is an illegal use of the property of the owner of the premises, has never been directly decided by the Courts. In all cases adjudicated, the question of the erection of poles entered into the consideration of the Court. The question, however, requires an answer in the affirmative.

Blackstone says: "Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cœlum*, is the maxim of the law; upwards, then, no man may erect any building or the like to overhang another's land:" 2 Comm. *18. Lord ELLENBOROUGH remarks that he remembers a case in which he held that the firing a gun, loaded with shot, into a field, was a breaking the close, and then puts the query whether tresspass would lie for passing through the air, in a balloon, over the land of another: *Pickering* v. *Rudd* (1815), 4 Camp. 219.

In reference to this, a learned author (Pollock on Torts, *281), says: "It does not seem possible on the principles of the common law to assign any reason why an entry at any height above the surface should not also be a trespass. The improbability of actual damage may be an excellent practical reason for not suing a man who sails over one's land in a balloon; but this appears irrelevant to the pure legal theory. * * * Then one can hardly doubt that it might be a nuisance, apart from any definite damage, to keep a balloon hovering over another man's land; but if it is not a trespass in law to have the balloon there at all, one does not see how a continuing trespass is to be committed by keeping it there. Again, it would be strange if we could object to shots being fired across our land only in the event of actual injury being caused, and the passage of the foreign body in the air above our soil being thus a mere incident in a distinct trespass to person or property."

In the case of *Board of Works* v. *United Telephone Co., Limited* (1884), L. R. 13 Q. B. 904: the question was whether the Board of Works for a particular district of London were entitled to an injunction to prevent a telephone company from carrying their wires diagonally across the street, at the level of the chimneys, the owners of the houses not objecting and there being neither a nuisance nor appreciable danger. The injunction was allowed by the lower Court, but the upper Court held, that, as the Board did not own the fee, and no nuisance or appreciable injury threatened, the decree was erroneous and the injunction was dissolved.

VI.

It has been generally held that the telephone, like the telegraph, is a common carrier, and is bound to treat all alike. Perhaps the earliest case upon this particular question is that of *American Union Tel. Co.* v. *Bell Tel. Co.* (1880), 24 AMERICAN LAW REGISTER, 578; where the telegraph company applied to the telephone company for an instrument to be placed in its office. The telephone company refused, and a mandamus was asked for and granted, compelling them to do so. In a similar case, the Court said: "The defendants are a quasi-public servant, and as such bound to serve the general public on reasonable terms and with impartiality. They are governed by the principle of the law of common carriers:" *Louisville Transfer Co.* v. *Am. District Tel. Co.* (1881); 24 AMERICAN LAW REGISTER, 579. In *Chesapeake & P. Tel. Co.* v. *B. & O. Tel. Co.* (1886), 66 Md. 399, holding a similar view, the Court said: "The telegraph and telephone are important instruments of commerce, and their service as such has become indispensable to the commercial public. They are public vehicles of intelligence, and they who own or control them can no more refuse to perform impartially the functions that they have assumed to discharge, than a railway company, as a common carrier, can rightfully refuse to perform its duty to the public. They may make and establish all reasonable rules and regulations for the government of their offices and those who deal with them; but they have no power to discriminate, and while offering readily to serve some, refuse to

serve others. The law requires them to be impartial and to serve all alike, upon compliance with their reasonable rules and regulations."

In all of these cases, one reason why telephone companies ought not to be bound to furnish rival companies, such as a telegraph company, the use of their instruments, was, that to compel them to do so, would be to injure their rights, lessen their income, and that their instruments were protected by patents and they had full privileges to use them as they chose. Upon this point BREWER, J. said: "A telephonic system is simply a system for the transmission of intelligence and news. It is, in a limited sense, and yet in a strict sense, a common carrier. It must be equal in its dealings with all. * * * The moment it establishes a telephonic system here, it is bound to deal equally with all citizens in every department of business; and the moment it opened its telephonic system to one telegraph company, that moment it put itself in a position where it was bound to open its system to any other telegraph company tendering equal pay for equal service." *State ex rel.* v. *Bell Tel. Co.* (1885), U. S. C. Ct. E. Dist. Mo., 24 AMERICAN LAW REGISTER, 573. TREAT, J., dissented on the ground that the license from the patentee forbade the company to deal with any other than the Western Union Telegraph Company, citing *American R. Tel. Co.* v. *Conn. Tel. Co.* (1881), 49 Conn. 352; where it was so held, and a mandamus was refused.

In *State ex rel.* v. *Bell Tel. Co.* (1880), 36 Ohio St. 296, a contract between a telephone company and the owner of telephone instruments, providing for discrimination in service rendered to different telegraph companies, was held to be void as against public policy, as declared by chapter four of the revised statutes of that State. The same decision was rendered in *Chesapeake & P. Tel. Co.* v. *B. & O. Tel. Co.*, by the Court of Appeals of Maryland (1887), 66 Md. 399; and *Bell Tel. Co.* v. *Comm. ex rel. Tel. B. & O. Tel. Co.*, by the Supreme Court of Pennsylvania, April, 1888.

VII.

What has been said above, in reference to discrimination against rivals, will apply equally to individuals. A case in point is *State* v. *Nebraska Tel. Co.* (1885), 17 Neb. 126; s. c. 24 AMERICAN LAW REGISTER, 263, in which it appeared that in the year 1883 the respondent placed an instrument in the office of the relator, but for some reason failed to furnish him with a directory of its subscribers in Lincoln and other various cities and villages within its circuit, which the relator claimed was essential to the profitable use of the telephone, and which it was the custom of respondent to furnish its subscribers. Finally, the directory was furnished, but the relator refused to pay for the use of the telephone during the time the respondent was in default with the directory. Neither party being willing to yield, the instrument was removed, and soon afterwards the relator applied to the agent of the respondent, and requested to become a subscriber, and have an instrument placed in his place of business, which request respondent refused. It was insisted that the conduct of the relator relieved the respondent from such liability. The Court compelled them to put the instrument in again, remarking: "We cannot see that the relation of the parties to each other can have any influence upon their rights and obligations in this action. If relator is indebted to respondent for the use of its telephone, the law gives it an adequate remedy by an action for the amount due." It was here held that mandamus was the proper action.

VIII.

In 1885, the Legislature of Indiana passed a law limiting the price to be charged to three dollars per month where one telephone only is rented by one person, and two dollars and fifty cents where two or more are rented to same individual. (See *infra.*) The telephone company, on several different grounds, claimed that the law was unconstitutional.

In a very able opinion, the Supreme Court of that State said: "It is first and most earnestly contended that as the articles used by the company as above are under the Con-

stitution and laws of the United States, the Legislature of a State has no power to limit the price, use, sale, or rental value of such articles, and that as a consequence, all Acts of a State Legislature of the class to which the one before us belongs, are inoperative and ineffectual for any practical purpose. Conceding the force as well as plausibility of many of the arguments and illustrations used by counsel, the ready and indeed inevitable answer is that the question thus presented ought no longer to be regarded as an open question. There is a reserved and at the same time well-recognized power, affecting their domestic concerns, remaining in all the States, which the government of the United States cannot and seldom has attempted to invade. This power, so varied and comprehensive that an exact definition, as applicable in all its phases, has so far been found to be impracticable, but the instances in which the existence of such a power has been judicially recognized in particular cases are quite numerous, as well as various in their application to our complex system of government. This reserved power is usually, though perhaps not always accurately, denominated the police power of the State, and embraces the entire system of internal State regulation, having in view not only the preservation of public order by the prevention of offences against the State, but also the promotion of such intercourse between the inhabitants of the State as is calculated to prevent a conflict of rights and promote the interests of all:" *Hocket* v. *State* (1886), 105 Ind. 250; s. c. 25 AMERICAN LAW REGISTER, 319. A month later a second case came before the same court and was decided in the same manner: *Hocket* v. *State* (1886), Id. 599. And on March 23, 1886, the same court decided (*Central Union Tel. Co.* v. *State ex rel.*) that the right to the use of a telephone and service, at rates fixed by the Legislature, might in a proper case be enforced by a writ of *mandamus*.

IX.

Parties can only compel permission to use an instrument so long as they use it in a proper manner, obeying all reasonable rules. In a case where one of the rules was that no improper language should be used, and the user becoming exasperated at a reply of the operator, when attempting to call

up some one, said to the operator: "If you don't get the party I want, you can shut up your damned old telephone,"—this was held to be improper language, and the company were justified in refusing the complainant longer use of the instrument. The Court say: "If indecent or rude or improper language was permitted, evil and ill-disposed persons would have it in their power to use it as a medium of insult to others, and perchance by some accident, such as the crossing of wires, or by a species of induction, the same communication might be launched into the midst of some family circle under very mortifying circumstances. The management of the telephone requires the observation of common propriety in the use of language, because in many cases the operators at the exchange are refined and well disposed females. In fact, all operators, whether male or female, have a right to be respected, and be protected from insult and annoyance. Society demands the conduct of all business with decency and propriety. Field on Corp., 669–70." There was a dissenting opinion in this case in which the judge held the language not *improper* under the circumstances: *Pugh* v. *City and Suburban Tel. Co.*, 9 Bull. 104 (Cin. Dist. Court, Ohio).

X.

Some new, intricate, and very interesting questions are certain to arise by the use of the telephone. But one has yet received the attention of a Supreme Court and that was decided by a divided Court: *Sullivan* v. *Kuykendall* (1885), 82 Ky. 483; s. c. 24 AMERICAN LAW REGISTER, 442. In this case, Sullivan, desiring to talk over the telephone with Kuykendall, asked the operator to call him, and the operator thereupon had a conversation with K., reporting to S., who was standing by, what K. said as it came over the wire. In a subsequent action between S. and K., it was held that the former might prove by himself and others what the operator reported to him as coming from K., the operator being called and not remembering the conversation.

This doctrine was violently disputed in a dissenting opinion by PRYOR, J., and in a note by M. D. EWELL.

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